In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 52

NICK W. MAROOSIS,
Petitioner,
vs.
JAMES G. SMYTH, United States Collector of Internal Revenue,
Respondent.

PETITIONER'S REPLY BRIEF.

THE BRIEF FOR THE RESPONDENT IN OPPOSITION IN EFFECT SUPPORTS THE POSITION OF PETITIONER THAT THERE IS NO LEGAL BASIS FOR THE CONCLUSION BY THE COURT OF APPEALS THAT PETITIONER'S BOOKS AND ACCOUNTS CONTAINED INSUFFICIENT OR IMPROPER ENTRIES.

In the Petition for Writ of Certiorari and brief in support thereof, petitioner discussed fully the evidence regarding the books and accounts of petitioner (Pet. Br. 22-25). As stated in that petition, the only ground suggested by the Court of Appeals for the

conclusion that the books were inadequate was the fact that the so-called daily sales books did not fully *itemize each sale* (R. 326).

The Petition further pointed out that the Trial Court disregarded the petitioner's books on the basis that its finding to the effect that two hundred cases of whiskey were diverted, was in itself a sufficient ground to disregard the petitioner's books (Pet. Br. 22-25); Finding of Fact VI [R. 52].

The brief for the respondent inferentially admits that there are no other grounds to support his contention that the books are incomplete inasmuch as no other grounds are therein set forth. Respondent relies solely on the contention that the failure to fully itemize each sale and that the taxpayer did not have a record of the individual sales for December, 1943, is sufficient grounds to disregard these books and records (Resp. Br. 6).

Respondent does not contend, and never has, that the permanent records of petitioner do not reflect the *total* sales for each and every day. Respondent, in fact accepted as correct, the gross sales figure from the very books he asks this Honorable Court to reject and based his assessment on those books (R. 265).

The only attack on the records is premised on the basis that petitioner did not maintain *an itemized list of each individual sale.* There is no requirement of law, accounting principle or business practice that requires such a record.

Since the only figure in question in the formula used by respondent was the amount of the distilled spirits sales, the question was whether the books and records reflect the information necessary to determine the distilled spirits sales.

Petitioner included in his brief before the Court of Appeals "Schedule I" (Appendix). This schedule traced every figure in the State Board of Equalization audit to the books and records of petitioner in evidence in this case and cited the page numbers in said records to which each figure could be traced.

The report of the State Board of Equalization auditor contained the following reference:

> "Records.
>
> "1. Do records meet requirements of section 24.4 of the Alcohol Beverage Control Act and the Rules and Regulations issued thereunder?
> "Yes." [R. 119.]

The foregoing quotation establishes that the records of petitioner are such as are required by law, and that from these records could be determined the percentage of distilled spirits sales against gross sales.

For the convenience of this Honorable Court, we have inserted a copy of said "Schedule I" in the Appendix to this brief.

The weakness of respondent's contention that the *dollar sales* of distilled spirits cannot be determined from the books and records in evidence because an itemized list of each sale was not maintained be-

comes even more obvious when we realize that the State Board of Equalization audit determined the dollar sales from the very books in evidence (Exhibit A, Appendix). These are the very records the respondent refused to audit, and yet now contends he cannot therefrom determine the dollar sales. Our Schedule I (Appendix hereto) proves the exact contrary beyond any cavil.

The finding by the Trial Court that two hundred cases were not reported by petitioner can only support the conclusion that the petitioner should be assessed for those two hundred cases. For the Trial Court to conclude that this finding supports a further finding or conclusion that the books are incomplete or inaccurate and that they therefore can be disregarded, is patently contrary to law. The books and records can only be impeached by evidence of erroneous entries therein, or omissions therefrom. Respondent conducted only one audit of a portion of petitioner's books, and that consisted of an audit of *every* purchase made by petitioner by an examination of the records of the wholesale liquor dealers, which audit *substantiated* the correctness of petitioner's books and records (R. 264-265.)

It can only be concluded, as a matter of fact and of law, that petitioner's books and records are correct and fully disclose all the information required by law and good bookkeeping practice necessary to determine his dollar sales during the period in question and the correctness of his April, 1944, physical inventory.

RESPONDENT IS IN ERROR AS TO THE EVIDENCE NECESSARY TO SUSTAIN PETITIONER'S BURDEN OF PROOF WHEN RESPONDENT CONTENDS THAT "THE TAXPAYER INTRODUCED NO EVIDENCE SUFFICIENT TO INDICATE THAT THE UNREPORTED DISTILLED SPIRITS THUS DETERMINED WERE NOT ON HAND ON THE TAX DATE". (Resp. Br. 8.)

The assessment was based on an alleged under-declaration of *over six hundred cases* of distilled spirits. Respondent's agents checked the petitioner's inventory on April 1, 1944 (R. 235, 240). Respondent's agents took their own physical inventory on May 2, 1944, and adjusted it back to April 1, 1944 (R. 240, 241). This check and the subsequent inventory reflected *no* under-declaration by petitioner (R. 235, 240, 244, 245).

Thus the entire assessment is based not on merchandise in the store which was not reported, but rather is a vague accusation of an alleged failure to report merchandise allegedly located at "unknown destinations". *Obviously, petitioner could not disprove an assessment by taking the respondent to all and sundry "unknown destinations" to prove to the respondent that he did not have any merchandise stored in said "unknown destinations".*

It is apparent that in the light of the existing formula used by respondent, the only method the petitioner had to establish that he had reported all distilled spirits on hand on April 1, 1944, was to show that his sales to April 1, 1944, and his inventory on April 1, 1944, accounted for all his distilled spirit purchases to that date. Yet the respondent refuses to discuss the merits of the 96.41% figure and the Trial

Court looked upon the question of the sales to April 1, 1944, as a "synthetic proposition" (R. 298).

There were four basic figures in the formula used by the respondent in making the assessment. They were (1) petitioner's opening inventory of distilled spirits on November 1, 1942; (2) his distilled spirits purchased between November 1, 1942, and March 31, 1944; (3) his gross sales during said period; and (4) the amount of said gross sales that represented distilled spirits sales (Resp. Br. 9). The opening inventory of November 1, 1942, was taken from petitioner's records, the purchase figures were independently verified by a revenue agent and supported petitioner's books and records, and the gross sales figure was taken from petitioner's books (R. 264-265).

However, the respondent has consistently refused to determine the amount of distilled spirits sales from said records and instead persists in basing the entire assessment on an admitted estimate of petitioner.

We thus note that three of the four figures used by respondent in making the assessment are figures *taken from* petitioner's "rejected" books. While the only figure used by respondent and *not taken* from the books is the admitted 86% "estimate".

Petitioner's uncontradicted explanation as to why he estimated 86% as the distilled spirits sales was that this figure was a result determined by *a prior* State Board of Equalization audit for an earlier period (R. 146). Petitioner offered in evidence an audit of the California State Board of Equalization

which showed that 96.41% of the sales between July 1, 1943, and March 31, 1944, were distilled spirits sales (R. 140; Plaintiff's Exhibit 21). This audit was in respondent's possession for five years and yet respondent admits he never sought to verify or audit the petitioner's books to determine the correctness or incorrectness of said audit (R. 272-3).

It is most significant that the respondent refuses to discuss the merits of this audit. It is groundless to discuss the State Board audit as though it were made independently of the books and records, since *every figure of the State Board audit can be found in the books and records of petitioner in evidence* (Exhibit 1, Appendix). On what basis does the respondent contend that it is impossible to determine the distilled spirits sales from the books and records in evidence? It is most significant that the respondent has not heretofore and does not now attack a single figure in the State Board of Equalization audit, but attacks only the 96.41% conclusion. The refusal to accept the 96.41% conclusion can only be explained by the fact that its use will eliminate the calculated under-declaration computed by the respondent.

Thus we find respondent is supporting an 86% "estimate" based on a State Board audit for *an earlier period* not in issue in this matter and yet *groundlessly refuses* to consider a State Board audit of the very period here in issue which audit, in turn, is completely supported by the books and records in evidence.

RESPONDENT IS IN ERROR WHEN HE STATES THAT PETITIONER CONCEDES TWO HUNDRED CASES OF WHISKEY WERE NOT REPORTED IN PETITIONER'S RETURN.

Counsel for petitioner did not concede there were any unreported distilled spirits in petitioner's possession on April 1, 1944. Counsel for petitioner conceded the possible propriety of the primary assessment on two hundred cases of whiskey, not because counsel agreed with the finding that said two hundred cases had not been reported, but merely because, at best, it can be argued that there is some evidence of such a shortage and petitioner sought a means of avoiding asking this Honorable Court to review a purely factual question (Pet. Br. 15, 29). Petitioner still respectfully submits, as he has consistently maintained, that, with the substitution of the 96.41% figure for the 86% figure in the calculated inventory formula, petitioner has sustained the accuracy of his physical inventory reported to the respondent.

Petitioner is firmly of the belief that his attempted concession is embarrassing to the respondent. This attempted concession, which pointedly and irrefutably establishes a total lack of any evidence to support any alleged under-declaration above these 200 cases, leaves the balance of the assessment totally unsupported. Petitioner respectfully submits that as a matter of law, he is entitled to a minimum refund of the tax on 810.05 proof gallons and in addition the fraud penalty and the interest paid on this portion of the assessment.

Petitioner has not restated the various questions of law or the authorities that were cited in his Petition for Writ of Certiorari and brief in support thereof. He is of the opinion that these matters are sufficiently covered in said petition.

Petitioner respectfully refers this Honorable Court to his Petition for Writ of Certiorari and the brief in support thereof on the impropriety of the fraud penalty in this controversy.

CONCLUSION.

It is respectfully submitted that the entire fraud assessment in this case is improper and that the primary assessment is illegal.

Dated, San Francisco, California,
September 26, 1951.

Respectfully submitted,
A. RUSSELL BERTI,
Attorney for Petitioner.

MORRIS M. GRUPP,
LEON SCHILLER,
Of Counsel.

(Appendix A Follows.)